

CQ453

Since the time of its inception, good or well-intentioned NEPA principles have had so many indirect issues becoming direct "impacts" to its implementation, that what was once thought to be a well-defined process is now merely an open-ended target for continual litigation. The 1993 memorandum quotes Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) – As the United States Supreme Court has noted, the "sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." [The crux of the case was not mentioned; just the component necessary for effect of this memorandum - rds]

The 1993 memorandum goes on to state:

"The very premise of NEPA's policy goals, and the thrust for implementation of those goals in the federal government through the EIS process, is to avoid, minimize, or compensate for adverse environmental impacts before an action is taken. Virtually the entire structure of NEPA compliance has been designed by CEQ with the goal of preventing, eliminating, or minimizing environmental degradation....

... "Pursuant to the policy goals found in NEPA Section 101 and the procedural requirements found in NEPA Section 102 and in the CEQ regulations, the federal departments and agencies should take every opportunity to include pollution prevention considerations in the early planning and decisionmaking processes for their actions, and where appropriate, should document those considerations in any EISs or [EA] prepared for those actions. In this context, federal actions encompass policies and projects initiated by a federal agency itself, as well as activities initiated by a non-federal entity which need federal funding or approval. Federal agencies are encouraged to consult EPA's Pollution Prevention Information Clearinghouse which can serve as a source of innovative ideas for reducing pollution.

... "Indeed, some agencies have already begun their own creative pollution prevention initiatives:

"Land Management

"The United States Forest Service has instituted best management practices on several national forests. These practices include leaving slash and downed logs in harvest units, maintaining wide buffer zones around streams, and encouraging biological diversity by mimicking historic burn patterns and other natural processes in timber sale design and layout. The beneficial effects have been a reduction in erosion, creation of fish and wildlife habitat, and the elimination of the need to burn debris after logging – in other words, a reduction of air and water pollution. ..."

Almost ten years later, we are still looking into more creative ways to fix this process; only this time, it's about how to save (because of catastrophic or near catastrophic fire) our soils, our water bearing forests and rangelands, and in the case of the USFS – hopefully to meet the intent of the Forest Service Organic Administration Act of 1897 in conjunction with later Acts of the Congress. The Task Force and CEQ should take into account that just because the framers of the various Organic Acts have died and are not available to defend their actions of yesteryear, that does not mean that CEQ can ignore those acts on congressional record.

This brings us full circle to the definition of "significant federal action". The original congressional intent considering a "major federal action significantly affecting the environment" (or words to that effect) as applied to the NEPA has been lost through Court action, legislation and/or Executive Order.

When speaking of cooperating agency, primarily during scoping and in the context of "significant federal action" when the cooperators are federal agencies combined with Tribal, State or local governmental entities, the Unfunded Mandates Reform Act of 1995 (Pub. Law 104-4) as applied to the Federal Advisory Committee Act preemption enters this discussion.

Information security while developing a draft environmental impact statement or supplemental EIS prior to public dissemination, can and do pose problems for Cooperating Agencies. For example: Pub. Law 104-4, Title II – Regulatory Accountability and Reform, Section 202. STATEMENTS TO ACCOMPANY SIGNIFICANT REGULATORY ACTIONS (2 U.S.C. 1532) at section 204(b)

CQ453

MEETINGS BETWEEN STATE, LOCAL, TRIBAL, AND FEDERAL OFFICERS. – The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to actions in support of intergovernmental communications where – (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

However, Section 202 (a) IN GENERAL – Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice was published, the agency shall prepare a written statement containing –

- (1) an identification of the provision of Federal law under which the rule is being promulgated;
- (2) A qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment and such an assessment shall include –
 - (A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and...
 - (5A) a description of the extent of the agency's prior consultation with elected representatives (under section 204 [above]) of the affected State, local, and tribal governments; ...

Since Title II is inclusive of the above sections, the question could be asked, that if a federal action does not meet or exceed the stated monetary amount in Section 202 (a), combined with promulgating a rule to that effect, are Cooperating Agencies still protected by preemption of the FACA, determined by Section 204 (b) as might be applied under CEQ in that circumstance. If it is found not to be a requirement, does the same instance preempt State statute?

The interest now generated with Cooperating Agency guidelines has been brought about primarily because of the fact, that localized impacts directly having effect on all of the human dimension of the NEPA process have largely been ignored. Especially those processes that cannot quantify with the \$100,000,000 threshold noted above. Case history such as *Uintah County v. Norton* (Civil No. 2:00-CV-0482J) among others, establishes we have a problem that can be alleviated with comments you hopefully will receive under B. 3 from those county participants.

1. *What are the characteristics of an effective joint-lead or cooperating agency relationship/process? (Provide examples)*

Provided below are areas the Task Force could review for the opinions (pro/con) of those most closely related to the process of State, County and Federal cooperation.

- ***Wasatch-Cache National Forest revision plan / Summit County, Utah – Uinta County, Wyoming.*** [See F. 5 page 10]
- ***Big Horn National Forest revision plan – The State of Wyoming, Office of Federal Lands Policy can place the Task Force in touch with those local governmental entities involved.***
- ***Bureau of Land Management, Jack Morrow Hills*** -- Coordinated Activity Plan Draft EIS of 2000 as a tiered component of the Green River Resource Management Plan-ROD of 1997 in relation to a later Supplemental EIS of former Secretary of the Interior Bruce Babbitt which appeared to be the

primary reason behind the local interest in 40 C.F.R. §1501.6 – Cooperating agencies; §1506.2 – Elimination of duplication with State and local procedures; and §1508.5 – Cooperating agency to a three county area of Wyoming.

CQ453

Former Secretary of Interior Bruce Babbitt also initiated an advisory committee (Green River Basin Advisory Committee-GRBAC) in 1996 for streamlining a process that was agreed to by the participating interests of the GRBAC. However, the DOI never followed through. This area is a prime history of what could have worked, what hasn't worked, and is presently ongoing – State of Wyoming, Office of Federal Lands Policy – Fremont, Sublette and Sweetwater Counties, Wyoming – Sweetwater County Conservation District.

- **Probably the best example to date of intergovernmental cooperation involving State and local governments, and federal agencies, is the recent Burned Area Emergency Rehabilitation Partnership stemming from the New Mexico Penasco fire of 2002.**

Although many factors were involved in the making of this partnership over many year's time, this is a success that the Task Force should review on how affected parties responded to an emergency situation. The same effort should be pursued on day-to-day partnerships between agencies and governments. This particular instance required communication, consultation, cooperation, and conservation that immediately dealt with – preservation of resources, restoration, recreation, use, service, science, and management principles and came in close to, or under 50 percent of projected timelines and expenditure of funding.

The above partnership efforts were inclusive of: USDA/Forest Service, USDA/NRCS, Otero County, New Mexico, local fire departments, New Mexico State Forestry, the Village of Cloudcroft, New Mexico, New Mexico State Highway & Transportation, Soil & Water Conservation District, The New Mexico Youth Conservation Corps, The community of Mayhill, New Mexico, local landowners and local businesses.

- Perhaps the Task Force might review the National Forest County Partnership Restoration (CPR) programs that we think prove worthy of broad dissemination.
2. *What barriers or challenges preclude or hinder the ability to enter into effective collaborative agreements that establish joint-lead or cooperating agency status?*
See B. and B. 1.
Funding is the number one challenge that hinders this process.
 3. *What specific areas should be emphasized during training to facilitate joint-lead or cooperating agency status?*

§1508.16 - Each of the above questions do not relate in depth to Lead agency, either State or federal. [See B. 1 above.]

C. Programmatic Analysis and Tiering:

1. *What types of issues best lend themselves to programmatic review, and how can they best be addressed in a programmatic analysis to avoid duplication in subsequent tiered analysis?*
Ref: JMHCAP DEIS and GRRMP with §1508.28 in relation to JMHCAP SEIS. [See B. 1 above.]

CP453

2. *Please provide examples of how programmatic analyses have been used to develop, maintain and strengthen environmental management systems, and examples of how an existing environmental management system can facilitate and strengthen NEPA analyses. [ISO 14001 <http://es.epa.gov/partners/iso/iso.html>].*

[Please reference F. 6, page 11. We feel it is an appropriate response for the NEPA Task Force to consider when analyzing ways to facilitate and strengthen the NEPA.]

D. Adaptive Management/Monitoring and Evaluation Plans

[See F. 1 this page]

E. Categorical Exclusions:

§1508.4, 1507.3(b)(1)(2)(i)(ii)(iii), 1508.9, 1508.18, 1508.27, 1506.8, 1508.17, etc.

Under present day procedural matters and inconsistent agency applications, categorical exclusions are difficult to assess or accomplish without new policy change. [See F. 2 & 4 below]

F. Additional Areas for Consideration: (improve and modernize NEPA implementation)

The below comments are excerpts from replies we requested regarding this comment. It seems that before CEQ can improve and modernize NEPA implementation, rock solid clarity must first be established to the NEPA guidelines with protections in place concerning frivolous lawsuits and appeal procedures that delay needed "actions".

1. I'm not very current on NEPA, although having been around to see it grow up, but there is one matter that needs to be looked at, specifically: *F. Additional Areas for Consideration: (improve and modernize NEPA implementation)*. It's pretty clear that what the courts are now considering a "major federal action significantly affecting the environment" (or words to that effect) is vastly different than what was conceived by the legislation. Somebody needs to go back to record to see what it says about the intent of congress. Case law has piled up contrary, I believe, to the intent of what should be covered by NEPA. I'm not a lawyer either, but may take more legislation to negate the legal precedents.

2. Private Property Rights and Protections Should be Paramount in Priority by Congress With Specific Protection Language Written Into the National Environmental Policy Act. Congress Builds Language into Acts for the Expressed Purpose of Property Protection. Suggested Language Based on Existing Congressional Acts:

"All actions by any State or Federal agency under the terms of NEPA are subject to valid existing rights. Any permits, habitat plans, contracts, reintroduction of species, related contracts and other instruments made pursuant to this plan shall be subject to valid existing rights. There will be no introduction or restrictions on private property. No private property will be taken for public use without due process and just compensation."

3. ...the whole process is so convoluted and politically messy that it has been driven into a quagmire of complex regulations that end up blocking any reasonable approach to resolving the issue.

4. I believe the whole issue with associated policy and corrected policy amendments has now become such a complex "mess" that only an internal agency "expert" will be able to decipher the policy for individual project situations in the field.

5. Local publics and governments will "wear out" well in advance of any resolution.

6. September 22, 2002 - There is a part of the process that I have never seen addressed. That is the fact that in the case of the Forest Service, especially, with their Appeal Reform Act requirements hanging over them, the entire NEPA process is designed to defeat the citizen who is in favor of the agencies proposed work.

CQ453

For example:

Let's say that the FS proposes a badly needed hazardous fuel-thinning project. They do the NEPA process and analysis from NOI to scoping, issue development, (as if they didn't know that to begin with), draft statement, comment period and agency response, final EIS and finally a ROD. Suppose that I as a citizen have tediously hung in there through all this, and at last a decision that I feel is reasonable and responsive is documented in the ROD. Good! Right??

Hardly.

The next phase is the appeal phase. These are usually carefully timed to create the greatest possible delay. They are filed at the end of the period allowed for appeals, etc. (Remember that here in R-1 100 percent of these projects have been appealed). Now I, and my part of society are walled out of the process! We can "intervene", but we are not really players any more. We have no tool with the standing and stopping power of the appeal process with which to attempt to influence the decision. We could file our own appeal if there were something the agency was doing that we objected to, but that just wastes their time and ours.

Now, we're into the waiting game. If the problem is insects they are happily chewing their way to heaven while the litigants object, complain and delay. But finally the decision is reached and the original decision is upheld.

Good again, we can get going, right? Not usually, here in R-1.

Now it's time for the lawsuit--and the general public is still shut out of any real meaningful part of the process. And the project is still stalled.

You get the picture. With the delays there is the very real chance that by now it is too late to actually do any good on the ground. If it's burnt timber it may have checked or decayed to the point of being unusable. If it's bugs they may well be into the second, third or later cycle and have spread, and the winner----the litigants who wanted nothing more than to stop the project to begin with. And the judge usually awards them a good part of their legal costs!

The losers are the bulk of the American people, the affected landscape and it's specific denizens, often the local communities, and our industries and marketplace.

NEPA could use a little work to clarify some of the subjective language, but it is those certain citizens that have made NEPA and the decision-making process the bureaucratic, horrendously costly, unworkable nightmare that it is.

The point is that this unbalanced playing field disenfranchises most of us ordinary citizens. We don't have the seemingly unlimited financial resources that the green teams do.

To deal with that I see no option but to limit citizen appeals and to fine those who file frivolous lawsuits and make them post a bond equal to the amount of the risk they are subjecting others to. I would require that negotiated settlements be made from the alternatives analyzed in the EIS. (Either uphold or deny)

We appreciate the opportunity to comment. It is our wish that those citizens, villages and regions who are most affected by the NEPA Task Force's opinion, always be considered while the Task Force navigates ways to make the NEPA process workable for everyone. Should you have any questions, please don't hesitate to contact us.

CQ453

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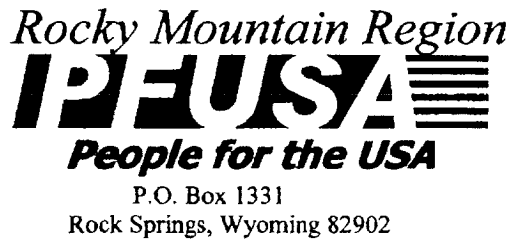
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RE: Notice and Request for Comments

Page 1 of 13 total

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